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District Court

FEB - 9 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

ALAN STUART MARKOFF, D.D.S. dba)
TOOTHWORKS and OPEN CHOICE,)

Plaintiff,)

vs.)

TODD KEITH JOHNSON, D.D.S.,)

Defendant.)

CIVIL ACTION. NO: 05-00305

REPLY TO RESPONSE TO MOTION TO
DISMISS SECOND CAUSE OF ACTION

Date : February 16, 2006

Time : 9:00 a.m.

Judge: Munson, Chief Judge

COMES NOW Defendant Todd Keith Johnson, D.D.S. ("Dr. Johnson"), by and through counsel and pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), to submit the following Reply to Response to Motion to Dismiss Second Cause of Action, entitled "Fraud and Misrepresentation."

INTRODUCTION

In opposing Defendant's motion to dismiss the second cause of action in Plaintiff's Complaint, Plaintiff takes the position that the claim for fraud contained therein has, in fact, been plead with sufficient specificity. The gravamen of Plaintiff's argument is that the business transaction that took place between the parties was of such a simple nature that Plaintiff is now only

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1 required to plead fraud in his complaint with *some* particularity. While it is true that the specific
2 facts and circumstances of a particular case will determine what particular allegations will satisfy
3 Rule 9(b)'s heightened standard for pleading, the fact that there are only two parties involved in this
4 transaction does not fully relieve Plaintiff of his burden to plead fraud with particularity. In this
5 instance, despite what Plaintiff has characterized as a relatively uncomplicated commercial
6 transaction (a characterization that Defendant disagrees with), Plaintiff still has failed to plead with
7 particularity sufficient facts that will enable Defendant to answer the allegations of fraud.
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10 11 **ARGUMENT**

12 Plaintiff continues to fail to specifically identify the allegedly fraudulent statements made by
13 Defendant by only vaguely describing the "what" and "when" of these statements. As Plaintiff
14 contends, "[t]he most basic consideration for a federal court in making a judgment as to the
15 sufficiency of a pleading for purposes of FRCP Rule 9(b) is the determination of how much detail is
16 necessary to give adequate notice to a defendant to enable that defendant to prepare a responsive
17 pleading."¹ The factual allegations in Plaintiff's Complaint and Response to this Motion, however,
18 do not provide adequate notice as to what statements Plaintiff contends were misleading, but instead
19 vaguely describe categories of statements made at indeterminate times. While Plaintiff may
20 conclude that this is notice adequate to enable Dr. Johnson to mount an effective defense, it does
21 nothing but force him to "just deny that he has done anything wrong."²
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26 ***1) Plaintiff Continues To Only Vaguely Describe What Statements Were "Fraudulent."***

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28 ¹ See Plaintiff's Response To Motion To Dismiss Second Cause Of Action previously filed with this Court at paragraph 25 citing *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985).

² *Id.* at paragraph 8 (this what Plaintiff contends is what Rule 9(b) is supposed to prevent).

1 Plaintiff contends that his vague description of the identity of the alleged misrepresentations
2 is sufficient to put Defendant on notice under Rule 9(b). It does not. Plaintiff variously describes
3 the alleged misrepresentation as “documentation and statements,”³ “representations”⁴ and “a
4 document.”⁵ Is Plaintiff alleging that the basis for his fraud claim is one printed document, several
5 documents, statements made by Dr. Johnson in person or some combination thereof? This is
6 unclear, and perhaps most telling is that Plaintiff has *never come forward with a copy of whatever*
7 *document or documents constitute the alleged misrepresentation.* Without a more specific
8 statement of which alleged misrepresentation Plaintiff means to complain, Dr. Johnson is unable to
9 mount a meaningful defense to the allegation of fraud.
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13 ***2) Plaintiff Continues To Only Vaguely Describe When These Statements Were Made.***

14 Furthermore, Plaintiff attempts to minimize the impact of his imprecise allegation of when
15 the misrepresentations were made by contending that Dr. Johnson must be on notice of what
16 statement constitutes the alleged fraud because there is only a finite period of time in which the
17 statement could have been made.⁶ This both over-simplifies the facts surrounding the negotiation
18 process as it took place and ignores the requirement that Dr. Johnson be placed on notice of what
19 statement (or statements) were allegedly false. First, Plaintiff repeatedly fixes the time of the
20 misrepresentation as “the time when Plaintiff and Defendant were negotiating,”⁷ “the time these two
21 dentists negotiated”⁸ and “the time period of negotiations.”⁹ As there was no specific identification
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25 ³ See Plaintiff’s Complaint previously filed with this Court at paragraph 13.

26 ⁴ *Id.*

27 ⁵ See Plaintiff’s Response at paragraph 16.

28 ⁶ See Plaintiff’s Response at paragraph 12.

⁷ Plaintiff’s Complaint at paragraph 13.

⁸ Plaintiff’s Response at paragraph 12.

1 of what statements were allegedly false (*See* above), so too is there no specific identification of when
2 these statements were made.

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5 Plaintiff makes an attempt to fix a precise date, by pointing to the “seller’s warranty” in the
6 *Agreement for the Purchase and Sale of a Dental Practice* signed by both parties, but this does
7 nothing to pin down the time of the allegedly false statement.¹⁰ Plaintiff claims that Dr. Johnson “is
8 being told by and allegation in the complaint that the misrepresentation was made during the time he
9 and the Plaintiff were negotiating the sale.”¹¹ Plaintiff then claims that the date of the
10 memorialization of the sale (as evidenced by the date signature on the agreement) was the date upon
11 which these statements were made.¹² Since negotiations over the sale and purchase of this practice
12 took place on several occasions before the date upon which the agreement was signed, only *some*
13 potentially misleading statements could possibly have been made on that date. Is Plaintiff saying
14 that the statements of which he complains were only made on that date, or that they could have been
15 made “during negotiations” as he has stated so many times before? This is unclear, and such an
16 unclear and contradictory allegation as to the time of the misrepresentation is as effective as no
17 allegation at all.
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22 CONCLUSION

23 Plaintiff still fails to plead specific facts regarding what allegedly fraudulent
24 misrepresentations form the basis for his second cause of action. Instead of pointing to specific
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26 ⁹ *Id.*

27 ¹⁰ Plaintiff’s Response at paragraph 15.

28 ¹¹ *Id* at paragraph 14.

¹² *Id* at paragraph 15.

1 statements made by Defendant, Plaintiff continues to vaguely describe "documents" that he was
2 shown during the course negotiations for the sale of a dental practice. Similarly, instead of
3 informing Dr. Johnson as to when these statements took place, Plaintiff merely says "during
4 negotiations." Without further knowledge of what specific statements Defendant allegedly used to
5 defraud Plaintiff, Dr. Johnson is unable to meaningfully respond to the allegations of fraud and
6 therefore, Defendant's Motion should be granted in full and the second cause of action in Plaintiff's
7 Complaint should be dismissed.
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11 Dated this 9th day of February 2006.

Respectfully submitted,

12
13 O'CONNOR BERMAN DOTTS & BANES
14 Attorneys for Defendant Todd K. Johnson

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16 By: 

17 GEORGE L. HASSELBACK, ESQ.
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